# In the Supreme Court of the United States

OCTOBER TERM, 1974

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NO. 74-184

MICHAEL S. ROSS, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

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**MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION**

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Petitioner brought this suit in the Court of Claims, seeking correction of his military records as well as damages. The court held that petitioner's claim was barred by the court's six-year statute of limitations, 28 U.S.C. 2501. Petitioner now contends that a prior district court action, which he instituted on February 25, 1972, tolled the running of the statute of limitations.

On February 20, 1966, petitioner was discharged from the Navy Reserve because of his enlistment in the Air Force. On June 17, 1966, he was admitted to the Air Force Hospital at March Air Force Base, California, for treatment of chronic schizophrenia. He was thereafter found unfit for service and discharged on August 24, 1966.

1. Petitioner brought suit in the United States District Court for the Central District of California on February 25, 1972. He alleged that the Navy had unjustly harassed him and excluded him from desirable training, thus defaming him and "effectively * * * convict[ing him] of criminal

conduct" (Pet. 22). His suit sought $28,000 in damages and expungement from his military records of all references to his service in the United States Air Force. On June 12, 1972, petitioner's suit was dismissed without prejudice by the district court for failure to exhaust administrative remedies and failure to state a claim upon which relief could be granted.

Petitioner then applied to both the Air Force and Navy Correction Boards for relief. The Air Force Correction Board denied his application on September 9, 1973,[1] and he brought this suit in the Court of Claims on September 25, 1973.

2. The Court of Claims exercises jurisdiction over suits filed within six years after the claim first accrues. 28 U.S.C. 2501. A claim for illegal discharge accrues immediately upon removal from military service. *Mathis v. United States*, 391 F. 2d 938 (Ct. Cl.), affirmed after remand, 421 F. 2d 703. We submit that the tolling question presented by petitioner does not control this case. Petitioner was discharged from the Navy on February 20, 1966, and filed his district court suit six years and five days later on February 25, 1972. Thus even if the filing in the district court is treated as a filing in the Court of Claims, it is out of time.

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[1]The Air Force Correction Board indicated that it could not act favorably on petitioner's request. Petitioner's theory was that his 1966 discharge from the Navy was void, and therefore his enlistment in the Air Force was invalid. But 10 U.S.C. 1552(a) permits the Secretary of a military department to correct only the military records of his own department, and the Air Force Correction Board therefore had no jurisdiction; it recommended that petitioner bring his claim before the Navy Correction Board.

In any event, the Court of Claims' statute of limitations is not tolled by petitioner's unsuccessful attempts to secure alternative remedies, such as suit in a federal district court. *Ylagan* v. *United States*, 101 Ct. Cl. 294, certiorari denied, 322 U.S. 763. Nor does recourse to the administrative process toll the statute. *Vincin* v. *United States*, 468 F. 2d 930 (Ct. Cl.).

The Court of Claims remedy is independent of these alternatives, and its statute of limitations unaffected by them. *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 517, is not to the contrary. *Crown* held that because the disputes clause of a government contract required the contractor to undertake administrative adjudication of his claims before judicial review was available, the statute was tolled by resort to the administrative proceedings. However, *Crown* distinguished those cases in which suit could have been brought without first resorting to administrative remedies. 386 U.S. at 519. The distinction controls the instant case; suits for correction of records and money damages because of illegal discharge can be brought in the Court of Claims without exhausting administrative remedies. See *Lipp* v. *United States*, 301 F. 2d 674 (Ct. Cl.), certiorari denied, 373 U.S. 932; *Friedman* v. *United States*, 310 F. 2d 381 (Ct. Cl.), certiorari denied *sub nom. Lipp* v. *United States*, 373 U.S. 932.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

NOVEMBER 1974.